

No. 2865

IN THE

United States Circuit Court of Appeals  
For the Ninth Circuit

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SOUTH COAST STEAMSHIP COMPANY (a corporation), claimant of the steamer "SOUTH COAST," etc.,

*Appellant,*

VS.

J. C. RUDBACH,

*Appellee.*

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APPELLANT'S PETITION FOR A REHEARING,  
and if that be denied, for Stay of Mandate.

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*To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:*

The appellant respectfully petitions for a rehearing of this case, and its counsel, in filing this petition, hereby certify that in their judgment the petition is well founded, and that it is not interposed for delay.

The appellant further prays that if its petition for rehearing be denied, a stay of mandate may be

granted by this Honorable Court for the purpose of enabling appellant to petition the Supreme Court of the United States to remove the case to that court by *certiorari*.

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### Points.

By its opinion, this court has decided that the law applicable to this case was not altered by the Act of June 23, 1910. This accords with appellant's position, and a rehearing as to this point is not desired.

We do, however, ask a rehearing as to the conclusion reached by this court concerning what the law was before the Act of 1910 was enacted, and consequently concerning what the law now is.

This court concluded that there is a divergence among the cases as to whether a charter-party which requires the charterer to furnish the supplies to the ship, withdraws from the master the power to order supplies, for which the material-man with knowledge of the terms of the charter-party, may assert a lien.

We respectfully submit that neither this court nor appellee's counsel has cited one case which shows any such divergence; whereas we have submitted and will cite in this petition, many authorities which hold, with unanimity, that no lien can be asserted, except in the case of "hand to mouth necessities."

This court referred to the learned and searching opinion of Judge Lowell in *The Underwriter*, 119 Fed. 713, as holding that no lien can be asserted under the circumstances of this case. But this court decided that the decision in *The Underwriter* was disapproved by the Circuit Court of Appeals of

Judge Lowell's Circuit, in *The Surprise*, 129 Fed. 873. Upon that premise, and with the conclusion that *The Surprise* is based upon the stronger reasoning, this court has overruled the opinion of Judge Lowell, and has decided that a lien may be asserted in this case.

In this regard we respectfully submit the following propositions:

(a) The decision in *The Underwriter* was not disapproved in *The Surprise*.

(b) The decision in *The Surprise* was concerned with a different question from that considered by Judge Lowell in *The Underwriter*.

(c) *The Surprise* is based upon facts vitally different from those involved in this case. *The Underwriter* is based upon facts identical with those involved in this case.

(d) There is no case cited in the opinion of the court and no case was cited by appellee's counsel which supports the court's conclusion.

(e) There are numberless cases which support the antithesis of the conclusion which was reached by this court.

Finally this court concluded that the owner's immunity from the necessity of paying the ship's bills did not relieve his ship from that necessity; and that the provision of the charter-party requiring the charterer to hold the owner harmless from any lien asserted, is tantamount to a declaration that liens may be asserted.

Neither of these conclusions is supported by authority, and each of them is completely at variance with decisions upon the precise point. We will refer to those decisions in the argument.

## Argument.

### I.

This court concluded that the Act of 1910

“was intended as declarative of maritime law respecting the subject, as it existed prior to the enactment. It was not designed to ordain any new or different principle of law.” (Type-written opinion, page 8.)

In this respect the court’s opinion coincides with the conclusion reached by the other courts of the country. (Appellant’s Brief, pp. 18-20.)

But the law as it existed prior to the enactment of the Act of 1910, was not at all, we respectfully submit, what this court has declared it to have been. This will appear from the twenty or thirty cases from which we will quote in this petition.

Appellee’s counsel understands this. He believed that his cause could not prevail if this court concluded that the Act of 1910 did not ordain a different principle of law from that which theretofore prevailed. He said in his brief:

“There is some authority for the proposition, contended for by this appellant, in a few early cases decided long before the enactment of the Federal statute giving a lien on a vessel for supplies furnished to it.” (Appellee’s brief, p. 2.)

“The conclusion is, therefore, irresistible that whatever the law may have been prior to June 23, 1910, knowledge on the part of the supply man that the charterer was bound to pay the operating expenses and keep the vessel free from liens is immaterial under the Fed-

eral Act of said date." (Pages 7 and 8 of appellee's brief.)

And so we respectfully submit that, having concluded that the Act of 1910 was merely declarative of existing law, the court erred in deciding that that law permits a lien under circumstances of a case like this.

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## II.

This court recognizes that the masterly opinion of Judge Lowell in *The Underwriter*, is authority for appellant's position, but this court disregards Judge Lowell's conclusions for reasons which, we submit, are erroneous.

(a) This court is of the opinion that the decision in *The Underwriter* was disapproved in *The Surprise*.

We submit that this court is in error in this regard. *The Underwriter* is neither mentioned nor referred to in *The Surprise*. The significance of that omission becomes compelling when one realizes that both cases arose in the same circuit; that the opinion in *The Underwriter* is now, and was then, recognized generally by courts and commentators as one of the most scholarly expositions available, of a proposition of maritime law; and that the two cases were decided within a period of two years.

(b) This court failed to note that the decision in *The Surprise* was concerned with a different question from that concerned in *The Underwriter*.

Judge Putnam, in his opinion, limits *The Surprise* to a case concerning "hand to mouth necessities." He says in his opinion:

"We wish, also, before taking up the detailed facts on this appeal, to lay aside another element. What were furnished by these libelants were *hand to mouth necessities.*" (34 C. C. A. at page 313.)

Judge Lowell in *The Underwriter* recognized that under such circumstances a lien would be allowed. Judge Lowell says (page 764):

"Where, however, the charter limitation is that found in this case, and where the coal is ordered, not in a port of distress, when it may reasonably be supposed that the further prosecution of the voyage is for the interest of the owner as well as for that of the charterer, I am of opinion that no lien exists."

(c) *The Surprise* is based upon facts vitally different from those concerned in this case. *The Underwriter* is based upon facts identical with those concerned in this case.

In *The Surprise* the supplies were "hand to mouth necessities" (*supra*), and the opinion is based upon that circumstance. This fact is recognized by appellee's counsel; it is emphasized by the court which rendered the decision and it is so declared by commentators.

Counsel for appellee in referring to *The Surprise* says:

"The court observes that, although the vessel was not in a port of distress, the supplies furnished were hand to mouth necessities, and

so they were in the case at bar. We prefer, however, not to put the case on that basis, but to regard it from a strictly logical standpoint, as did the judge of the lower court." (Appellee's brief, pp. 6-7.)

Indeed, appellee readily recognized that he could not put his case on the basis that the supplies were "hand to mouth necessities", notwithstanding that some of them **were liquors and cigars.** (See bills of account filed as original exhibits in this court.)

Judge Putnam was very careful to limit the effect of his opinion in *The Surprise* to the case of "hand to mouth necessities." In the course of his opinion, he says:

"We have no occasion to comment upon, or lay down any rules with reference to, circumstances involving unusual expenses, and with regard to which there would be *ample opportunity to consult the owners* in the usual manner. What, in such event, would be required, in view especially of the fact that *The Surprise* was *a chartered vessel*, is not now relevant. (p. 314.)

We have an ordinary case of minor supplies furnished to a vessel in a foreign port of the class of which she had immediate need, and a large part of which she could not take up conveniently, except at the place where needed; a case with circumstances under which, prior to *The Kate* and *The Valencia*, no admiralty court ever refused a lien, unless the owner showed that there was no necessity for credit to the vessel, and that the *merchant* knew that fact, or had very good reason to know it, *or was in some way clearly put on inquiry.* (p. 315.) \* \* \* The conditions with regard to the supplies of the classes furnished by Robinson,

when obtained by the authority of the master, express or implied, under the circumstances of this case, are commonly so pressing that they overcome the merely ordinary stipulations on the part of the charterer that he will not burden the vessel with liens." (p. 316.)

A few weeks after rendering his opinion in *The Surprise*, Judge Putnam wrote the opinion in *The New Brunswick*, 129 Fed. Rep. 893, and there he said:

"The petitioner undertakes to bring this appeal within *The Surprise* (decided by us on March 29, 1904), 129 Fed. 873, and *The Philadelphia*, 75 Fed. 684, 686, 21 C. C. A. 501, also decided by us. This he fails to do. In each of these cases, *hand to mouth supplies were furnished* at intermediate ports on the orders of the master, or under such circumstances that they were presumed to be by his orders. Certainly there is nothing in this record to enable us to frame a judgment for any portion of the coal in issue as having been thus ordered."

In *The Philadelphia*, (1896) 75 Fed. 684, 685, (the basis of the decision in *The Surprise*) Putnam, Circuit Judge, said:

"The learned Judge of the District Court found that the supplies, in all of the suits, were furnished on the credit of the respective vessels, and that the libelants had no notice that the vessels were under charter in which it was agreed that the supplies should be furnished at the expense of the charterers. \* \* \*

"The supplies were the reasonable hand to hand quantities of coal and water needed for their use in short coastwise trips."

Another circumstance which, we submit, demonstrates that *The Surprise* does not govern, or even apply to the instant case, is found in the language of the judge who wrote the opinion. It will be remembered that *The Surprise* is based upon the decision of the same court in *The Philadelphia* (*supra*), and it was of this case that Judge Putnam, who wrote the opinion in *The Surprise*, himself, said (*The Iris*, 100 Fed. Rep. 104, 107) :

“In *The Philadelphia* \* \* \*, where it was maintained that the facts were similar to those in *The Kate* and *The Valencia*, the question which arose in those cases was laid aside, because the court found that the supplies were furnished under such circumstances that they were to be held as furnished in a foreign port on the orders of the master, thus bringing the circumstances within \* \* \* the supposed hypothetical case stated in *The Kate* at pages 470 and 471; 164 U. S.”

The hypothetical case to which Judge Putnam refers is stated by the Supreme Court (164 U. S. 470, 471) as follows:

“If the libelant in this case had furnished the coal upon the order of the master, *and without knowledge or notice that the vessel was operated under a charter-party*, or if the coal had been furnished upon the order of the charterer as well as upon the credit of the vessel, *under circumstances which did not charge libelant with knowledge of the terms of the charter-party*, but charged it only with knowledge of the fact that the vessel was being operated under a charter-party, *a different question would be presented.*”

So Judge Putnam practically says that *The Philadelphia*, the basis of *The Surprise*, was decided upon the theory that the furnisher either was ignorant of the charter-party or was ignorant of its terms. Surely a theory which cannot prevail in this case, wherein it is specifically found that the furnisher was notified that the South Coast was under charter and that the charterer was required to pay all bills.

In addition to the evidence which Judge Putnam, himself, furnishes of the fact that his decision in *The Surprise* is limited to the case of "hand to mouth necessities", and in addition to the admission in this regard, of appellee's counsel, we have the criticism of Mr. Fitz-Henry Smith, Jr., in 21 Harvard Law Review 345, where, in referring to *The Surprise*, the commentator says:

"The opinion lays great emphasis upon the character of the necessaries furnished the vessel."

(d) There is no case cited in the opinion of the court and none was cited by appellee's counsel, which supports the court's conclusion.

*The Surprise*, as we have already indicated, does not refer to *The Underwriter*, does not decide the point there involved, is limited to the case of "hand to mouth necessities", and is not authority for a case such as the one involved here.

The only other authority cited by the court in support of its conclusion is *Thomas v. Osborn*, 19 How. 22. In that case *the lien was not allowed*, the libel was dismissed; consequently, the quotation

from that case which is embodied in the opinion of Judge Wolverton, is merely dictum. However, even in that dictum, this illuminating observation is made:

“But this doctrine cannot be safely extended to the case of an owner *pro hac vice*, in command of a vessel. Practically his special ownership leaves the enterprise subject to the same necessities as if the master was merely master, *and not the charterer.*”

Mr. Justice Curtis, who wrote the opinion in *Thomas v. Osborn* (*supra*) was very familiar with the rule that the master who is part owner, nevertheless maintains his distinct identity as the master, and his powers as such are in no respect affected by his interest as owner. The rule is universally recognized. It is an elementary principle of maritime law. Conklin says (page 80):

“It is only the contracts which the master enters into, *in his character of master*, that specifically bind the ship.”

The matter is elaborately considered in *The Mary Morgan*, 28 Fed. 196.

*We have pointed out that there is no case cited in the opinion of the court, and none was cited by appellee's counsel which supports the court's conclusion.* On the other hand

(e) There are numberless cases which support the antithesis of the conclusion which was reached by this court.

Some of these cases follow.

*The Columbus*, (1879) 5 Sawy. 487; Fed. Cas. 3044;  
*The William Cook*, (1882) 12 Fed. 919;  
*The S. M. Whipple*, (1881) 14 Fed. 354;  
*The Secret*, (1879) 15 Fed. 480;  
*Stephenson v. The Francis*, (1884) 21 Fed. 715, 725-726;  
*The Cumberland*, (1886) 30 Fed. Rep. 449, 455;  
*The Ellen Holgate*, (1887) 30 Fed. Rep. 125;  
*The International*, (1887) 30 Fed. 375;  
*The Samuel Marshall*, (1892) 49 Fed. Rep. 754, 760;  
*The Samuel Marshall*, (1893) 54 Fed. 396, 398-399, 404;  
*The Kate*, (1896) 164 U. S. 458;  
*The Alvira*, (1894) 63 Fed. 144, 156, 160;  
*The Rosalie*, (1895) 75 Fed. 29;  
*The H. C. Grady*, (1898) 87 Fed. 232;  
*The Robert Dollar*, (1902) 115 Fed. 218, 219-220;  
*The North Pacific*, (1900) 100 Fed. 490;  
*The Underwriter*, (1902) 119 Fed. 713;  
*The Vigilant*, (1907) 151 Fed. Rep. 747, 751;  
*Northwestern Fuel Co. v. Dunkley-Williams Co.*, (1909) 174 Fed. 121;  
*The City of Milford*, (1912) 199 Fed. 956;  
*The Thomas W. Rodgers*, (1912) 197 Fed. 772;  
*The Ha Ha*, (1912) 195 Fed. 1013;  
*The J. Doherty*, (1913) 207 Fed. 997;  
*The Malloa*, (1914) 214 Fed. 308;  
*The Francis J. O'Hara, Jr.*, (1915) 229 Fed. 312;  
*The Oceana*, (1916) 233 Fed. 139;  
*The Yankee*, (1916) 233 Fed. 919, 925-6.

In *The Columbus*, (1879) 5 Sawy. 487; Fed. Cas. 3044, Judge Hoffman said:

"For these reasons I am of opinion that the lien conferred by the statute is essentially a maritime lien, that it is subject to the same rules and to be tested by the same principles as those which apply to liens for supplies furnished to a foreign vessel, and that it was not intended to confer upon a 'master, agent or consignee' an irrevocable power to hypothecate the vessel for supplies in the port where the owner resides, contrary to his instructions, and in spite of his protest, and that the material-man, who, with full notice of the circumstances, furnishes supplies to the master, must look to him personally, and not to the owner or the vessel for repayment."

In *The William Cook*, (1882) 12 Fed. 919, it is held:

"The libelant is in this case precluded from alleging that the coal was furnished upon the credit of the vessel. The evidence is clear and convincing that he had express notice, from the owners, of the charter-party and of its terms, and that neither they nor the vessel should be held for supplies, and that thereupon the libellant arranged specifically with Pollock, the charterer, for weekly payments. Upon such facts he could not lawfully charge the ship, and the coal must be held to have been supplied upon Pollock's personal credit. Beinecke v. The Secret, 3 Fed. Rep. 665; The Norman, 6 Fed. Rep. 406. After such notice it would be a gross violation of justice and equity to permit a material-man to continue to furnish supplies and charge the ship therefor, which would be virtually at the expense of the owners, who had no interest in the supplies and had care-

fully used all possible means of avoiding liability. The Columbus, 5 Sawy. 487. There are doubtless circumstances in which the known obligation of the charterer to pay for supplies would not prevent a lien on the ship, as where a vessel is in a foreign port in distress, with no means of obtaining supplies necessary to complete her voyage and reach the hands of her owners, and where express notice not to credit the ship had not been given. In such cases the interests of her owners and the necessities of the case might raise an implied authority in the master from the owners to obtain necessary supplies on the credit of the ship, notwithstanding the charterer's known obligation to pay for them. The Monsoon, 1 Spr. 37; The City of New York, 3 Blatchf. 187, 188."

In *The S. M. Whipple*, (1881) 14 Fed. 354, decided in this District, Judge Hoffman held:

"Where the owner, who charters a vessel to third parties and under the terms of the charter-party appoints the master for the term of the contract, seeks to displace the lien given by statute for materials and supplies furnished the vessel by setting up a private agreement by which the master was deprived of the authority to create liens on the vessel, he should show by clear proof that explicit and unequivocal notice of the facts was given to persons dealing with the vessel."

*The Secret*, (1879) 15 Fed. 480.

Blatchford, Circuit Judge, said:

"Although *The Secret* was in a foreign port, and although Murray, F'erris & Co., when ordering the coal, stated to Russell & Hicks that it was for *The Secret*, yet the circumstances were such that the libelant's agents, Russell & Hicks,

were put on inquiry, from which they could easily have learned this, notwithstanding the above facts. Murray, Ferris & Co. were the charterers of the vessel, and had no power to bind the claimant or the vessel to pay for coal bought for her. If they had used due diligence they would have ascertained such want of power."

*Stephenson v. The Francis*, (1884) 21 Fed. 715, 725-726, where the court says:

"Again, the ship in this case was under no necessity of proceeding upon her new trips, for which this coal was furnished. Savage, by his charter, had no right to pursue her ordinary navigation at the ship's expense. If he could not fit her out for her trips without resorting to her own credit, having no right to use that credit for ordinary supplies, it was his duty to surrender her, or, at least, not to run her until he could arrange to do so without a violation of his agreement with the owner. There was no commercial necessity that she should depart upon this trip; and the general owner had no interest that she should be navigated except according to the terms of the charter. In this respect the case is wholly different from that of *The City of New York*, 3 Blatchf. 189, where the vessel was in a port of distress, on an unfinished voyage, and where the interest of the ship and of her general owner also required the supplies. Broadly considered, therefore, the first requisite for a lien, viz., a necessity for the supplies did not exist. Had Savage, being under no necessity to continue the vessel's trips, and not being in any port of distress, expressly contracted for ordinary supplies on the ship's credit, this would have been a clear wrong to the general owner, and a violation of the terms of the charter, because the stipulation of the charter was for the very

purpose of preventing this. The language of the supreme court in the case of Gracie vs. Palmer, 8 Wheat. 605, 639, would in that case seem to be applicable. ‘The charterer’, the court say, ‘has contracted with the shipper (here the material man) to do an act which he could not perform without violating his own contract with the ship’s owner; and he must therefore be considered as having entered into a contract subordinate in its nature to that previously existing between the owner and charterer. And this was approved in The Freeman vs. Buckingham, 18 How. 182. In the case last cited, Curtis, J., also expressly limits the effect of the ordinary maritime usages to ‘contracts \* \* \* entered into with a person who has no notice of any restriction.’ Page 490. But, in the present case, Savage clearly had no intention of violating the charter, or of obtaining supplies on the ship’s credit, and the question of his *power* does not, therefore, properly arise in this case. The notice, moreover, given by the captain to the libelants, was of itself one of the terms upon which the coal was supplied. The captain is the person who in a foreign port specially represents the ship and all interests combined. When he gives notice that the ship is not to be bound for supplies, that becomes one of the terms on which any supplies subsequently delivered must be deemed furnished, and which estop the material-man from asserting the contrary. Considering the knowledge of the charter that the libelants possessed, as well as this notice from the captain, and the fact that the supplies were for the ship’s ordinary use, and not under the stress of any maritime necessity, or in a port of distress, the obligations of good faith, without the observance of which no lien is sustained, estop the libelants from asserting any credit to the ship, or holding her answerable.” (Citing cases.)

*The Cumberland*, (1886) 30 Fed. Rep. 449, 455, where the court says:

“The same conclusion would follow in the case of Philbrick, who furnished coal to the amount of \$900 during November, December and January, upon the application of the masters, were it not for one circumstance. He says he had no knowledge of how the boat was being run; that the coal was furnished upon the credit of the boat, and he would not have furnished it upon the credit of the owners or McKay; but he admits that on the twentieth December he met a party who claimed to be her owner, and informed him of the charter and its terms. This I consider sufficient to put him upon his guard, and cause him to make inquiries as to the truth or falsity of the statement, and, if he did not, he cannot claim to have been acting in good faith, and without notice. Judgment will be allowed for the amount of coal furnished before the date when he received this information, and the rest disallowed.”

*The Ellen Holgate*, (1887) 30 Fed. Rep. 125, where the court held:

“Persons supplying provisions for the crew, and those advancing money to pay the claims of material-men, may look to the vessel for payment, if the transactions have taken place away from her home port, and at the request of her master, unless it can be shown that the master was without authority, and that the parties had knowledge of such want of authority.”

*The International*, (1887) 30 Fed. 375, where the court says:

“Had this been a question of materials or supplies furnished by a material-man having

knowledge of the terms of the charter, no lien upon the vessel would have been sustained, unless the supplies were furnished in a port of distress, and were necessary to enable the vessel to reach her owners, i. e., unless the supplies were necessary to the ship and her owners, and not merely to the charterer's business." (Citing cases.)

In *The Samuel Marshall*, (1892) 49 Fed. Rep. 754, 760, the court in denying a lien for coal furnished on the order of the master, said:

"But the merchant is presumed to know that it is a common thing for a vessel to be hired, and to be managed and used, in the employment of others, under charter-party with the owner or otherwise, under circumstances where the obligation for supplies does not rest upon the owner. And if the facts presented to him are sufficient to induce a reasonably prudent man, having a just regard to the rights and interests of others, to suppose it probable that the owner is not employing the vessel, but that it is in the service of another, under charter or other agreement involving the payment of charges and expenses by the charterer or lessee, he is bound in good faith to inquire. When the circumstances denote that the owner of the vessel is not the party for whose interest the supplies are furnished, and would not be at fault if they were not paid for, it would be inequitable that a merchant should have the right to give credit to another, and assert a lien therefor, contrary to the stipulations and interests of the owner. \* \* \* The merchant is under no obligation to furnish the supplies. He may do so, or not, and he may sell for cash or on credit, as he thinks advantageous to himself. If he does furnish and on credit, in the face of an agreement between others of which he has notice, devolving the obligation of pay-

ment upon another than the owner, and denying to the charterer the right to hypothecate the ship, he ought not to be allowed to assert a lien upon the owner's property."

The decision in this case was affirmed (*The Samuel Marshall*, (1893) 54 Fed. 396) and in writing the opinion of affirmance, Taft, Circuit Judge, said (pp. 398-399) :

"The questions in the case are two: First. Did the libelants obtain a lien for the coal furnished to the steamer Marshall under the general maritime law? Second. If they did not, then are they entitled to a lien under the state law of Michigan? Judge Severens, in the court below, held, in a satisfactory and convincing opinion, that they had no lien in either aspect of the case, and we entirely concur with him in that view."

Judge Taft also said (p. 404) :

"It is true that, under certain circumstances, the master of a vessel, under a charter, where the charterer is the owner pro hac vice, may hypothecate his vessel for supplies, contrary to the terms of the charter-party, but this is where there is dire necessity to save the vessel, or to bring her home within the reach of the owners. No such case is here presented. This was the home port of the charterers. The necessity was only that of going on the voyages for which the vessel was chartered, and not to bring the vessel home to its owners, or to save it from injury or loss."

The decision was followed in *The Kate*, (1893) 56 Fed. 614, and the latter was affirmed in

*The Kate*, (1896) 164 U. S. 458,  
where the Supreme Court said:

"If no lien exists under the maritime law, when supplies are furnished to a vessel upon the order of the master, under circumstances charging the party furnishing them with knowledge that the master cannot rightfully, as against the owner, pledge the credit of the vessel for such supplies, much less one is recognized under that law where the supplies are furnished, not upon the order of the master, but upon that of the charterer who did not represent the owner in the business of the vessel, but who, as the claimant knew, or by reasonable diligence could have ascertained, had agreed himself to provide and pay for such supplies. and could not, therefore, rightfully pledge the credit of the vessel for them.

\* \* \* \* \*

If the libelant in this case had furnished the coal upon the order of the master, and without knowledge or notice that the vessel was operated under a charter-party, or if coal had been furnished upon the order of the charterers as well as upon the credit of the vessel, under circumstances which did not charge libelant with knowledge of the terms of the charter-party but charged it only with knowledge of the facts that the vessel was being operated under a charter-party, a different question would be presented."

The opinions rendered in *The Samuel Marshall* (supra) were approved by Judge Morrow in this district in *The Alvira*, (1894) 63 Fed. 144, 160, in which the learned judge said:

"Counsel for claimants rely greatly upon *The Samuel Marshall* case, 49 Fed. 754; Id. 4 C. C. A. 385, 54 Fed. 396. The opinions in that case contain a very satisfactory statement of the law of domestic liens, both in the decisions of the district Judge and of the appellate

tribunal (Circuit Court of Appeals, Sixth Circuit); but upon a careful reading of the case I do not find anything inconsistent in the law, as there expounded, with that of the case at bar. The facts are of a different character, and this, of course, must be taken into consideration. In that case both the lower court and the appellate tribunal held that actual notice had been given to the supply man. In the case at bar no actual notice was given to the material men, nor am I able to find, from the evidence produced, that they were in possession of such facts as ought to have put them upon inquiry, or that their failure to be informed was due to carelessness or indifference. In the case of *The Samuel Marshall* the owner had no actual notice of the furnishing of the coal, and had, therefore, no opportunity of protecting himself by notifying the supply man. In the case at bar the owners were fully apprised of the fact that repairs were being made, and that materials were being furnished therefor. There, the coal for which a lien was claimed was something which the charterer was bound to furnish, and for which the owner received no direct benefit; here the owner derives some benefit in getting back an improved vessel. I do not allude to this last feature as constituting a distinguishing mark which would require the application of different principles of admiralty law, but simply to show that the facts of the *Samuel Marshall* case are not analogous, in their main features, to the case at bar."

In the course of his opinion in *The Alvira* (supra) Judge Morrow lays down the precise rule for which we contend in this case. He says:

"Therefore, the general principle that the owner is deemed to consent to the accruing of liens where the entire possession, control, and management of a vessel is intrusted to another

is qualified by this condition: If the supply or material man know of the charter or the relation in which the ostensible owner holds, or if he be advised of the real status of such relation by the general owner or by the charterer, or is placed in possession of such facts as would put, or ought to put, a reasonably prudent man on inquiry, the presumption arises that the supplies, materials, or repairs were furnished upon the credit of the charterer himself, and there is no lien. And the onus lies on the supply or material man to remove this presumption. The reason for this is plain. Courts of admiralty do not favor secret liens; otherwise, owners would often fall an easy prey to liens created by injudicious or unscrupulous charterers. Moreover, the supplies, materials, or repairs are generally furnished exclusively for the benefit of the charterer; at least it may be said that he is the party primarily benefited thereby, the owner, as a general rule, being only incidentally benefited, if at all." (Page 156.)

Finally, in *The Rosalie*, (1895) 75 Fed. 29, Judge Morrow held:

"Where materials were furnished for the use of a vessel, upon the order of a company which had possession of her under a contract of purchase, and which was, therefore, the owner pro *hae vice*, in the port where such company had its principal place of business, by material men who either knew the company's relation to the vessel, or were in possession of the avenues of information, and of facts sufficient to put them on inquiry, held, that credit must be considered to have been given to the company, and that, consequently, no lien was created. *The Alvira*, 63 Fed. 144, distinguished.

The mere fact that persons furnishing materials in the home port, on the order of the owner

pro hac vice, ‘suppose’ that the vessel is good for the purchase price, is not of itself sufficient to create a lien.”

Another decision rendered in this District and which, if followed, is absolutely determinative of the instant case, is *The H. C. Grady*, (1898) 87 Fed. 232, where Judge De Haven said:

“The materials were furnished and repairs made at the request of Captain Denny, the master of the vessel. The remaining libels referred to are for supplies furnished. The evidence shows that the supplies were also furnished for the use of the steamer upon the order of Capt. Denny. Neither of the libelants made any inquiry in relation to the ownership of the steamer, or as to whether she was being operated by any person other than her owner.

It is claimed by the intervener, Strong, that under these circumstances, the libelants are not entitled to enforce a lien against the steamer. I do not think this contention can be sustained. The person upon whose order the supplies were furnished, and repairs made, was the master of the steamer, duly appointed such by the said Strong, her registered legal owner. Strong, as before stated, was and is a resident of Portland, Or., and the supplies were furnished for the use of the steamer, and the repairs made upon her, in San Francisco. It is the rule of the general maritime law that the master, in the absence of the owner, has authority in a foreign port to bind his owners for necessary repairs and supplies. \* \* \* When these supplies were furnished, and repairs made to the steamer *H. C. Grady*, her owner, Strong, was absent in Portland, Or., and the steamer was in a foreign port, within the meaning of the maritime rule just stated, as it is well settled that a port is deemed to be foreign to a vessel which is not

in the State where she belongs, and where her owner resides.

\* \* \* \* \*

There was nothing, in the facts or circumstances, under which the master contracted with either of the libelants, sufficient to suggest the slightest doubt of the actual authority of the master to order the supplies and repairs, and the libelants were therefore not required to make any inquiry as to his actual authority, but had a right to presume that he was clothed with the ordinary powers of a master, and that he was not acting in violation of instructions given him by his principal. The supplies and repairs were necessary, and therefore within the general authority of the master to procure.

\* \* \* \* \*

In addition to what has been said in relation to the contracts under which the several claims of Whelan & Whelan and McMurphy & McAvoy arise, it is proper to state that said libelants supposed that the steamer was responsible for the work performed and materials furnished by them, and that they would have a lien upon her for the value of such work and materials; but neither of said libelants made any inquiry regarding the ownership of the steamer, or whether Crocker & Brooks had any right to pledge the credit of the steamer for the work and materials ordered by them. On August 6, 1897, when perhaps about one-half of their respective claims had accrued, Crocker & Brooks, as principals, and said libelants as sureties, executed a bond, whereby they became 'jointly and severally bound unto Fred R. Strong in the sum of one thousand dollars'.

\* \* \* \* \*

The libelants were informed by the recitals contained in this bond that Strong was the owner of the steamer, and that Messrs. Crocker & Brooks were in possession of, and were about to operate the steamer, under a contract to

purchase; and if they were not directly informed by such recitals that the vendees were to permit no claim or lien to accrue against the steamer, while in their possession, and until fully paid for by them, they were at least put upon inquiry as to the terms of such contract. The libelants, however, did not inquire as to the terms of the agreement, and, under such circumstances, there is a conclusive presumption that, if inquiry had been made, they would have been fully informed in relation thereto. They are therefore charged with knowledge of the fact that Crocker & Brooks were in possession of said steamer, under an agreement for its purchase, and by the terms of which they had further agreed with the intervener, Strong, that all alterations in, or repairs which they caused to be made to, such steamer, should be paid for by them, and that they were not to permit any liens to accrue against such steamer while it should be in their possession under that contract.

\* \* \* \* \*

As before stated, some portion of the claim of Whelan & Whelan is for materials furnished and repairs made by them upon the order of the master; what portion, however, does not appear, nor whether such materials were furnished and repairs made before or after the execution of the bond above referred to. If before, it was incumbent upon the libelants to prove the fact, and the value of such materials furnished and repairs made; and if after its execution their claim therefor must be held to be subordinate to that of the intervener, Strong, because, as we have seen, they were charged, by the recitals in the bond, with notice of the terms of the contract under which Strong had parted with the possession of the steamer, and such contract was sufficient to put the libelants upon inquiry as to the authority of the master to bind the steamer for materials and repairs

while in the possession of Crocker & Brooks, under their contract to purchase, and they made no such inquiry."

Judge Hawley recognized the same doctrine when he said in *The Robert Dollar*, (1902) 115 Fed. 218, 219-220:

"It is shown by the uncontradicted evidence in this case that, while the Robert Dollar was being operated as a carrier of freight and passengers between Seattle and Nome and other places in Alaska, it was necessary for her to replenish her supplies of coal and water at Dutch Harbor, both in going north and returning; that her master did not have money to pay her bills for these necessaries; and that upon his request the libelant furnished coal, water, and provisions to the steamer, which were necessary for her use and to feed her passengers and crew; that neither the owner nor charterer had any credit at Dutch Harbor; and said supplies had to be obtained on the credit of the ship. These are the conditions under which, by the maritime law, a lien becomes attached to a ship, and the only semblance of a defense to this part of the case is made upon the ground that by the charter party it was agreed between the owner and the charterer that the latter should pay all the bills incurred in operating the vessel during the period for which she was hired, and should at the expiration of said period, return the vessel to her owner free from liens. It is not pretended that the libelant had actual knowledge of this stipulation in the charter party; but it is claimed that the fact that the vessel was chartered to the Alaska & Pacific Steamship Company had been announced in newspapers, and was generally known among merchants and shipping men, and that the captain had possession of a copy of the

charter party; so that if the libelants had made inquiry they might have become informed with respect to its conditions. There are two reasons why this defense cannot prevail. In the first place, the indebtedness was incurred by the master of the ship, who was appointed by the owner, and whose authority was ample to abrogate the agreement whenever it became necessary to do so in order to enable the vessel to get on and complete her voyage. The second reason is that this defense is not available to the charterer. Liens for supplies upon chartered vessels, in favor of creditors to whom notice has been given that the owners have parted with their possession relying upon agreements that the charterers will keep them free from liens, are not permitted, because the pledging of the credit of a ship under such conditions would be fraudulent, and the courts have refused to recognize such fraudulent claims in cases in which the owners have appeared to defend against them. But when a charterer obtains supplies on the credit of a ship in violation of a promise made to the owner that he will not do so, he has no right to plead his own broken promise to defeat his creditors."

Judge Hawley allowed the lien, but the decision was reversed by this court and the libel was dismissed (116 Fed. 601).

In *The North Pacific*, (1900) 100 Fed. 490, the Circuit Court of Appeals for this Circuit, held:

"The terms of a time charter of a steamer contained provisions indicating that the venture was to some extent a joint one between the owner and charterers. The owner, who was a member of a firm of shipping agents, was to sell the tickets for passage on the contemplated

voyages, and his firm were advertised as agents for the vessel. The office of the charterers was also with such firm, with nothing to indicate that the business was separate. *Held*, that one furnishing to the vessel necessary supplies for the voyage on the order of the master, without either actual or constructive notice of the charter, was entitled to a lien on the vessel therefor, although by the terms of the charter such expenses were to be paid by the charterer.”

*The Underwriter*, (1902) 119 Fed. 713, was quoted *in extenso* in our brief. Now we merely quote from the syllabus as follows:

“A charter-party providing that the charterer shall provide and pay for all the coal used by the vessel, and that the master, although appointed by the owner, shall be under the orders and direction of the charterer as regards employment, agency, or other arrangements, is not merely a contract between the parties which binds the charterer to reimburse the owner for coal paid for by the latter, but is also a limitation on the authority of the master to bind the owner or the vessel for such supplies; and no lien upon the vessel exists in favor of libellant who supplied coal on the order of the master in a foreign port, but which was not a port of distress, and was merely across the river from the home port, where the owner resided, and no actual necessity was shown for pledging the credit of the vessel, and where libellant knew the vessel to be under charter, and was put upon inquiry as to the terms of the charter.”

In *The Vigilant*, (1907) 151 Fed. Rep. 747, Judge Gray, speaking for the Circuit Court of Appeals for the Third Circuit, said (p. 751):

"Notwithstanding the ability of the distinguished judge who delivered the opinion of the court in that case, we are unable to agree that statutory liens of the kind here in question are thus limited. Upon the facts as stated, the case was correctly decided, and the proposition contained in the language above quoted was not necessary to sustain the decision. The Samuel Marshall had been chartered from its owner, with the express stipulation that the charterer was to have full control, employing and discharging officers and men, and with the obligation of paying all running expenses, including the purchase of coal. Libelants furnished coal to the vessel thus chartered, with knowledge of the fact of the charter, and that the master, who ordered the coal, was directly in the employ of the charterer. They also knew that the charterers were under obligation to furnish the coal, and that they had no authority, by themselves or by their agent, to make the owner liable therefor. Under this state of facts, it was held that the supply men had notice that the company had chartered the vessel, and that the coal was furnished on the credit of the charterer, and not of the vessel, and that, therefore, no lien attached under the Michigan statute, giving a lien for all debts contracted for by the owner or master on account of supplies furnished. No debt can be incurred, or lien established on its account, under the maritime law or the statute of the state, except by the authority, express or implied, of the party to be charged. In this case, there was express knowledge by the libellant of the stipulation by the charterer, which rebutted any implication of the authority on the part of the master to charge the vessel. The fundamental principles of agency cannot be ignored in the creation of liens, either by the law, maritime or the statutory law of the

State. The case of *The Kate*, 164 U. S. 458, 465, 17 Sup. Ct. 135, 140, 41 L. Ed. 512, was decided upon the same grounds."

The latest decision preceding the act of 1910, which we have been able to discover is that rendered by the Circuit Court of Appeals of the Seventh Circuit (Grosscup, Baker and Kohlsaat, Circuit Judges), on October 5, 1909, in the case of *Northwestern Fuel Company v. Dunkley-Williams Co.*, 174 Fed. 121.

Every detail of fact in that case is so precisely the same as the facts in the instant case, and the decision there is so perfectly contrary to the opinion here, that, we submit, the present decision should not stand without further consideration and without an express disapproval of the conclusion reached by the Seventh Circuit, should it be found that that decision is erroneous.

When one compares Northwestern Fuel Company case (*supra*), with the instant case, he finds every detail of fact identical. He finds the same provisions respecting the necessity that the charterer shall supply the ship; he even finds "the provision that the charterer will hold the owner harmless from all liens against the vessel," which the learned District Judge felt was so compelling in this case (p. 10 of typewritten opinion). In the Northwestern Fuel Company case it was fuel that was furnished, coal to permit the vessel to "discharge its peculiar function" of carrying on maritime commerce. The fuel was sometimes received by the

captain, himself, personally. "The engineer usually signed the receipt for coal, but sometimes such receipts were signed by the captain, the same being charged on the books of the libelant to the steamer, care of Chicago and Milwaukee line" (p. 124). The libelant testified that: "He gave credit to the vessel upon the supposition that he would have a lien upon her in any event" (p. 125). In neither case did the owner expressly declare to the charterer, in the charter-party: "Thou shalt not permit a lien to attach to this vessel!" Nor in either charter-party was there anything "that unalterably inhibits the master or the charterer from incurring any expenditures on the credit of the ship that may become a lien thereon" (p. 10 of typewritten opinion). Yet in the instant case, without even a reference to the decision of the Circuit Court of Appeals for the Seventh Circuit (the last decision of any court prior to the act of 1910), the lien is allowed.

In *Northwestern Fuel Company v. Dunkley-Williams Company* (supra), the Circuit Court of Appeals said:

KOHLSAAT, Circuit Judge (after stating the facts as above). The test of liability herein is conclusively stated by the Supreme Court in the case of *The Valencia*, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710, as follows, viz.:

"One furnishing supplies or making repairs on the order simply or a person or corporation acquiring the control or possession of a vessel under such a charter-party cannot acquire a maritime lien, if the circumstances attending

the transaction put him on inquiry as to the existence and terms of such charter-party, but he failed to make inquiry, and chose to act on a mere belief that the vessel would be liable for his claim."

It appears that libelant delivered the coal under the impression that the vessel would be liable therefor in any case. This accounts for its lack of diligence in making investigation as to the facts. The credit was not given to protect the owner's interest in the steamer, but that of parties for the time being operating the boat. Therefore, the question for the court to pass upon is whether libelant had actual knowledge, or was chargeable with knowledge, of the charter-party between appellee and the Chicago Transportation Company. The term "*Chicago and Milwaukee Line*" seems to have been merely descriptive of the class of traffic the Petoskey was engaged in, and did not constitute a name. This was of itself a circumstance calculated to raise inquiry. Any effort on the part of libelant to ascertain why the owner of the steamer should operate under such a phrase would have resulted in the discovery of the charter-party and its terms. Nothing short of fatuous confidence in the liability of the steamer for supplies under all conditions can explain the failure to make investigation. Moreover, appellee introduces evidence to the effect that notice of the charter-party was mailed to libelant. The latter denies receiving any such letter. While this may not be conclusive proof of notice, as against libelant it relieves appellee from all suspicion of negligence in the premises, if any would otherwise attach. That no evidence is adduced as to notice to other furnishers of supplies is not persuasive, since the item of coal would be the first to be looked after. We deem it clearly

shown that whatever negligence there was in the premises was that of libelant.

The attempt to construe the language of the charter-party so as to give libelant the benefit of the clause prohibiting liens to accumulate in excess of \$1,000 we deem without merit. Appellee was entitled under the agreement to receive the Petoskey free of all liens. The \$1,000 clause served its mission when it placed it within the power of appellee to enforce the forfeiture clause. It was evidently placed in the charter-party for the benefit of appellee, and not for the solace of those furnishing supplies without reasonable investigation as to responsibility. It is difficult to understand how an owner could protect himself against parties furnishing supplies without using due diligence to ascertain the facts, unless it be required that he do as appellant suggests: paint a notice upon the vessel—a method which does not commend itself to our judgment. This opinion is not at variance with that of Judge Putman in the case of *The Surprise*, 129 Fed. 873, 64 C. C. A. 309, since here we find that libelant was put upon notice of the charter-party.

The finding of the district court is affirmed."

Up to this point our quotations have been taken from cases decided under the law prevailing prior to the enactment of the act of June 23, 1910. The subsequent quotations come from cases decided under the act.

In *The City of Milford*, (1912) 199 Fed. 956, an agreed purchaser was in possession of the ship under a contract, and there was nothing therein which unalterably inhibited the purchaser from incurring expenditures on the credit of the ship that

might become a lien thereon. In fact the contract required the purchaser to provide a bond to protect the owner against liens upon the ship. The supplies involved in the libel were supplied upon the order of the master. It would not be simple to conceive of a case more nearly parallel with the instant case. Yet the decision was based entirely upon the question of notice. The court, in its opinion, subjects the testimony to a close analysis, and concludes therefrom that the material-men had no notice that the person in possession held the ship under a contract requiring it to pay for the supplies; and, consequently, allowed the lien. The court said:

“There is nothing in the evidence to suggest that any of the libelants had notice that the company was not the sole owner of the ship. A number of them proved that, before extending credit, they were told that the company owned the ship. \* \* \*

The claimant's engineer in person gave the orders for some of the supplies, repairs or services. He approved the bills for others. \* \* \* the claimant, \* \* \* says that, had the libelants exercised the reasonable diligence required by the statute, they would have made further inquiry before extending credit.

\* \* \* \* \*

Did the act require them to do all this? Its purpose was to simplify the law. There was need for it. The battle as to the liability of the ship for materials and services furnished it has been going on for centuries. Judge Lowell, in that wonderfully learned and exhaustive opinion of his in *The Underwriter*, (D. C.) 119 Fed. 713, tells a story of the long struggle. He shows

how the questions of substantive law and of policy involved had in the course of hundreds of years become confused and complicated, by being mixed up with differences as to rules of procedure and with disputes as to jurisdiction between the courts of admiralty and those of common law. Rights of materialmen might depend upon whether, when they furnished supplies, the ship was in a foreign or in a domestic port. \* \* \* The distinction between foreign and domestic ports had come to be without substantial reason. Congress, in the act referred to, has abolished it.

\* \* \* \* \*

The general purpose of this enactment is plain. Hereafter, when supplies are furnished for a ship to one lawfully having the management of the ship, the presumption is that the ship is liable for them. If the material-man knows nothing about the authority of the person in possession of the ship, except that he visibly has the management of it, he may furnish the supplies, and the ship will be bound for them. But he may know something more. He may have knowledge that the person entrusted with the management of the ship has, by agreement with the real owner of the ship, no right to subject it to liens. If, under such circumstances, a material-man furnishes supplies, he cannot hold the ship. If he could, he would profit by his own wrong. Even when he does not know certainly that the person having the management of the ship has no authority to bind it, he may have learned such facts or circumstances as will suggest to him the probability that such may be the case. If so, he may not shut his eyes and his ears to further inquiry. He cannot say: 'I admit that I heard something which, if true, indicated that the person who was ordering the supplies had no right to bind the ship for them; but I did not

know whether that which I had heard was true or not. I could easily have made inquiries, and, if I had inquired, I would have found out the truth; but I did not do so.'

He who is so careless of other men's rights will find that his own will be determined, not by what he absolutely knew, but by what it was in his power to find out, if he had acted with ordinary and reasonable care. And so the act provides that nothing in it shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of the charter-party, or agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries, was without authority to bind the vessel therefor.

Before this proviso can have any application, something must have occurred to put the furnisher of the supplies upon inquiry. The proviso is a proviso. It is to be understood in such sense as will harmonize it with the general purpose of the act. That purpose was to make the management of a vessel at its port of supply presumptive evidence of the right to bind it for supplies there furnished. That purpose prevails unless it shall be shown that the person so managing the vessel was unlawfully or tortiously in possession or charge of it, or unless something has been brought to the knowledge or attention of the person furnishing the supplies which in honesty and good conscience puts upon him the duty of inquiry as to whether the person who has the management of the ship has the right to pledge its credit." (Citing cases.)

The *Thomas W. Rodgers*, (1912) 197 Fed. 772, and *The Ha Ha*, (1912) 195 Fed. 1013, are each of

the same assistance in the present problem as is *The City of Milford* (*supra*).

*The J. Doherty*, (1913) 207 Fed. 997, cannot, we submit, be distinguished from this case. There the person ordering the towage was authorized under the Act of 1910 to bind the vessel, because he was the managing owner of the charterer. Yet the court held there was no lien. The court said (page 1001):

"In the light of these principles the case at bar presents no difficulty. The effect of the charter was to give the charterer entire control of the movements and navigation of the boat, and the fact that the owner paid the man in charge is not sufficient to prevent the charter from being a demise of the boat. *Monk v. Cornell Steamboat Co.*, 198 Fed. 472; 117 C. C. A. 232. The fact that the charter was oral, without any express statement of the terms thereof, is immaterial. By an implied agreement, as effectual in law as if it were expressed, the charterer is bound to disburse the vessel and to protect her from liens. Moreover, so far as knowledge of the charter-party on the part of the libelant is concerned, or his duty to inquire, there is no essential distinction, for if the libelant knows that the vessel is chartered, though orally and informally he must be held to know, as a matter of course, that the usual obligations exist. *The Surprise*, 129 Fed. 873; 64 C. C. A. 309. It is quite possible that the libelant believed that it had a lien, no matter who was relied upon to pay. But this was not giving credit to the vessel. *The Samuel Marshall*, 54 Fed. 398, 4 C. C. A. 385. Nor was its method of charging the items. *McCaldin vs. The Stroma*, 53 Fed. 281, 3 C. C. A. 530. Knowledge that the boat was chartered, and the neces-

sary implication in such a business as this that the charterer should pay for towage, as well as the course of dealing directly with the charterers, and the testimony of the libelant's clerk, Oliver, as to the usual practice of collecting from charterers are sufficient to prevent a recovery from the libelant." (Citing cases.)

In *The Malloa*, (1914) 214 Fed. 308, the person in charge was not inhibited from incurring any expense on the credit of the vessel which might become a lien thereon, and yet Judge Cushman proceeded to consider the question of notice and decided (we quote from syllabus) :

"Facts considered, and held not such as to put one making repairs on a vessel on inquiry as to the authority of the person contracting for the repairs, who was an agreed purchaser of a part interest, and in possession, to bind the vessel therefor under the provisions of Act June 23, 1910."

In *The Francis J. O'Hara, Jr.*, (1915) 229 Fed. 312, the court said :

"It is not contended that under the general admiralty law a lien would attach for this salt. The lien claimed arises, if at all, under the Act of June 23, 1910 (U. S. Comp. St. 1913, Sec. 7785), which provides in substance that any person furnishing supplies to a vessel shall be entitled to a lien, and that the master shall be presumed to have authority from the owners to secure supplies for the vessel. It further provides (Section 3) that nothing in the Act shall be construed to create a lien when the furnisher, by the exercise of reasonable diligence, could have ascertained that the person ordering the supplies was without authority to bind the vessel therefor. The salt was ordered

by the master of the vessel. He was in fact without authority to bind the vessel therefor. *Rich v. Jordan*, 164 Mass. 127; 41 N. E. 56.

The real question is whether, upon the agreed facts, the intervening petitioner could, 'by the exercise of reasonable diligence', have ascertained the master's lack of authority. The petitioner knew that the vessel was being sailed on a lay; it knew that on some lays the vessel would be liable for the salt, and that on others she would not. It made no inquiry whatever, either from the master or the managing owners, though it might easily have done so, as to what lay she was being operated under, and it had no information on the subject from other sources. It is not stated in the agreed facts that the master, if inquired of, would not have told the truth. On several previous occasions salt had been furnished by the petitioner to the vessel when she was on the one-half lay, and was therefore liable for it, and it had been paid for by the owners. The last time before that here in question was more than two years previous, in May, 1909; and there had not been thereafter anything equivalent to a continuous course of dealing between the vessel and the petitioner, from which authority to buy supplies on her account might be inferred. There was no actual or constructive representation that the vessel was on the half lay or was liable for supplies when this salt was purchased.

The case is not like *The City of Milford* (D. C.) 199 Fed. 956, where the libelants acted on information which they supposed reliable, and were held to have been justified in so doing, though the information turned out to be false. It is said in the opinion in that case: 'I am persuaded that those witnesses who have testified that he (the president of the company which was the agreed purchaser of the vessel) and the other agents of the company lead them (the lienors) to believe that it was the owner

of the ship have testified truthfully and accurately.' Rose, District Judge, *The City of Milford*, (D. C. *ubi supra*) 199 Fed. at 958.

Here the petitioner had no reason to suppose that the vessel was being sailed under a lay which made her liable for supplies, nor that the master had authority to pledge her credit therefor. It furnished the salt without making any effort to find out as to those important facts.

It seems to me that the petitioner, knowing that the vessel was on a lay, was bound to inquire whether that lay was one under which she, or the master and crew, were to pay for the salt. *The Eureka*, (D. C. Cal.) 209 Fed. 373. The slightest inquiry would have disclosed that the master had no authority to buy it on the vessel's account."

In *The Oceana*, (1916) 233 Fed. 139, the provisions respecting payment for repairs, keeping the vessel free from liens and holding the owner harmless from all liens asserted against the vessel, are substantially the same as the corresponding provisions of the charter party in the instant case.

"Until the ship should be fully paid for the purchaser covenanted, among other things:

"(a) To keep said ship clear of any liens from any cause, and if any lien or libel is filed or asserted the same shall be immediately bonded by the purchaser. The purchaser agrees to promptly pay current bills, for supplies and repairs to said ship and exhibit at reasonable times the ship's accounts and bills to seller's representatives.

"(b) To keep said ship and equipment in good repair."

Nevertheless the court recognized that if the fact that the vessel was chartered had been brought to the attention of the material men, no lien could have been asserted by them.

The court held (we quote from the syllabus) :

“The owner of a steamship made a contract for its conditional sale, to go into immediate service on its delivery, which was to be as soon as certain preliminaries could be arranged. Within a very few days, and before formal delivery, agents of the purchaser, including the chief steward and commissary went on board and took actual charge for the purpose of repairing, equipping and supplying the vessel for sailing. Such agents ordered and received repairs, supplies and other necessaries with the knowledge of the seller, which also knew that the bills therefor were not paid, but took no steps to notify the persons furnishing the same that they could not look to the vessel for payment. More than a month after delivery, the seller exacted a second payment on the purchase price with knowledge that a large sum was then due and unpaid for such supplies, etc., in violation of the terms of the contract of sale, which required the purchaser to promptly pay all such bills, to keep the vessel free from liens, and to at once procure the release of any liens filed or claimed, and provided that on failure to comply with such requirements the seller might terminate the contract and retake possession. Held, that all persons so furnishing repairs, supplies and other necessaries both before and after formal delivery of the vessel, without knowledge or notice of the contract of sale, were entitled to liens as against the seller

which had retaken possession under the contract."

In *The Yankee*, (1916) 233 Fed. 919, the court allowed the libel because the supply man had no knowledge that the vessel was under charter. The court said (pp. 925-6) :

"But it is contended by the claimant, that even if it should be found that actual deliveries had been made to the vessel they were made upon orders of the charterer under circumstances which destroyed the statutory presumption of its authority. Unquestionably the presumption of the statute may be removed and the right to a lien based upon it destroyed by affirmative proof which actually displaces it. *The Patapsco*, 80 U. S. (13 Wall) 329, 20 L. Ed. 696. This the statute contemplates by prescribing that no lien is conferred 'when the furnisher knew or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter-party, agreement for sale of the vessel, or for any other reason, a person ordering repairs, supplies or other necessaries, was without authority to bind the vessel therefor'. This proviso is nothing more than a statutory declaration of a principle long recognized in maritime jurisprudence and repeatedly announced by the Supreme Court of the United States. *The Kate*, 164 U. S. 458; *The Valencia*, 165 U. S. 264. It is in effect that no lien shall be afforded and no presumption given in aid of a materialman who furnishes supplies under circumstances which put him on inquiry as to the authority of the one giving the order to bind the vessel. That is, no one with knowledge that supplies are ordered by one without author-

ity to pledge the vessel, or no one awake to circumstances which suggest inquiry as to that authority, may shut his eyes to what he sees or to what he could see by looking, and avail himself of the remedies or the presumptions of the law.”

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### III.

This court concluded that the requirement that the charterer and not the owner should pay the ship’s bills was not tantamount to an agreement that the owner’s property (the ship) need not pay them.

We respectfully submit that the application of such a principle is very striking. If an owner need not pay money, but his property will be sold under a lien if he does not pay it, assuredly he is without much comfort! If a person’s property may be sold for a debt which he need not pay, assuredly he will conclude that it is only sophistry to say that he need not pay it!

The very point has been considered.

In *The Sarah Cullen*, 45 Fed. 511, the court said:

“the libelant was informed that the Ridgewood Ice Company was to pay the towage which was equivalent to notice that the vessel was not to pay it.”

In *The Iris*, 100 Fed. 104, 109 (cited by this court in its typewritten opinion) it was said:

“The charterer of a vessel, who has no interest in her hull except for a temporary use under

the charter, cannot be said to be procuring supplies at his own charge if he procures them under such circumstances as would impose a lien on what is the property of the person who lets the vessel."

Surely this court cannot mean to say that any principle of law justifies the conclusion that a man's property is not immune from lien for a debt which the man himself is not required to pay!

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#### IV.

This court held that "by reason of the provision that the charterer will hold the owner harmless from all liens against the vessel, there is an implication of authority on the part of the charterer to incur such expenses on the credit of the vessel".

The court cites no authority to support this proposition. The Circuit Court of Appeals for the Seventh Circuit reached precisely the contrary conclusion in *Northwestern Fuel Co. v. Dunkley-Williams Co.*, 174 Fed. 121, where the court said:

"The attempt to construe the language of the charter-party so as to give libelant the benefit of the clause prohibiting liens to accumulate in excess of \$1000 we deem without merit. Appellee was entitled under the agreement to receive the Potesky free of all liens. The \$1000 clause served its mission when it placed it within the power of appellee to enforce the forfeiture clause. It was evidently placed in the charter-party for the benefit of appellee, and not for the solace of those furnishing supplies

without reasonable investigation as to responsibility."

See also:

*The City of Milford*, 199 Fed. 956;  
*The Gen. J. A. Dumont*, 158 Fed. 312;  
*The Golden Rod*, 151 Fed. 6;  
*The Surprise*, 129 Fed. at page 880. .

Dated, San Francisco,  
October 31, 1917.

Respectfully submitted,

MARCEL E. CERF AND C. H. SOOY,  
*Counsel for Appellant  
and Petitioner.*

#### CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

MARCEL E. CERF,  
*Of Counsel for Appellant  
and Petitioner.*